RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JOSEPH JESNER, *Et Al.*,

Petitioners,

v.

ARAB BANK, PLC.,

Respondent.

On a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* OF COMPARATIVE LAW SCHOLARS AND PRACTITIONERS IN SUPPORT OF PETTITIONERS

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INTEREST OF *AMICI*

Amici—whose names and biographies appear in the Appendix—are some of the world's leading experts and practitioners in the field of comparative law, with special emphasis on human rights.[1] As part of their work in countries around the world, *Amici* regularly examine through scholarship and practice the ways that corporations are held liable for conduct constituting violations of international norms.

The Second Circuit below relied on the majority opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), to reject the proposition that corporations can be liable under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), for conduct that violates the law of nations. This conclusion was based on an analysis of international law that overlooked an important source of international law, namely general principles of law. General principles are recognized as one authoritative source of international law by Article 38(1)(c) of the Statute

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money for the preparation or submission of this brief. Consents to the filing of *amicus curiae* briefs are on file with the Clerk of the Court pursuant to Rule 37(3) of the Rules of the Supreme Court of the United States.

of the International Court of Justice and are applied by international tribunals and domestic courts alike. Indeed, this Court has repeatedly endorsed the use of general principles of law to determine the content of international law. Therefore, to the extent that this Court decides that international law informs the analysis of whether corporate liability is available under the ATS, general principles are of particular relevance.

Amici join in this brief in order to aid the Court in determining the content of international law through an examination of general principles.[2] Because they come from many different countries with varying legal backgrounds, *Amici* are able to provide a unique consensus position on the norms accepted as general principles in major legal systems and the appropriate use of general principles in this case. Each *amicus* separately and all collectively offer expertise on these issues that is not available from the parties themselves.

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[2] *Amici* have been informed that a separate brief addressing international law in the form of treaties and customary international law is being submitted by prominent scholars of international law in support of Petitioners. This brief therefore focuses exclusively on general principles as an independent source of international law. *See* Statute of the International Court of Justice art. 38 ¶ 1 (a)-(c), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

SUMMARY OF ARGUMENT

Amici respectfully submit that the court below, by applying the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148-49 (2d Cir. 2010) ("*Kiobel I*"), reached its conclusion that corporations could not be liable under the ATS only by focusing on the wrong evidence of international law. This error led it to conclude that no international norm imposes or allows corporate liability, even though corporate liability for civil wrongs is commonplace throughout the world.

That line of reasoning is even less sound now than it was then. Corporate liability continues to be a fundamental feature of the tort law of all major legal systems. Indeed, corporations continue to be subject to suit and sanction in courts throughout the world for conduct that violates national and international norms. The *Kiobel I* majority's failure to give any weight to this overwhelmingly common practice in major legal systems caused it to erroneously conclude that corporate liability should not be available under the ATS, even though such liability is part of international law.

ARGUMENT

I. The Court of Appeals in *Kiobel I* Overlooked the Role of General Principles of Law as a Source of International Law.

The majority in *Kiobel I* concluded that corporate liability was unavailable under the ATS by focusing on customary international law. *See Kiobel I*, 621 F.3d at 128 (stating that "we have continued to . . . look[] to customary international law to determine both whether certain conduct leads to ATS liability and whether the scope of liability under the ATS extends to the defendant being sued"); *id.* at 131 (examining "the existence of a norm of corporate liability under customary international law").[3] However, customary international law is merely one source of international law, and the majority erred by failing to consider another important source of international law: general principles.

1. General principles are legal norms that are "accepted by all nations in *foro domestico*"[4] and are

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[3] Amici agree with petitioners that the ATS and domestic tort law, not international law, govern who can be a defendant under the ATS. To the extent the Court determines that international law should inform that analysis, amici respectfully submit that general principles of law are an essential source of international law that must be consulted.

[4] Permanent Ct. of Int'l Justice, Advisory Committee of Jurists, *Procès Verbaux of the Proceedings of the Committee*,

discerned by reference to the common domestic legal doctrines in representative jurisdictions worldwide.[5] General principles of law are recognized as one of the authoritative sources of international law, having been codified as a source of international law in the Statute of the International Court of Justice ("ICJ"), of which the United States is a party. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993; *see also Kiobel I*, 621 F.3d at 132 ("we have long recognized as authoritative the sources of international law identified in Article 38 of the Statute of the International Court of Justice");

July 16th – July 24th, 1920, with Annexes (The Hague 1920) at 335 (quoting Lord Phillimore, the proponent of the general principles clause).

[5] *See* CHARLES T. KOTUBY, JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS (Oxford Univ. Press 2017); LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 217-38 (6th ed. 2014); MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 149-60 (5th ed. 2014) (discussing the use of general principles by international tribunals); ANTONIO CASSESE, INTERNATIONAL LAW 151 (2001) (general principles are drawn from the rules of the most significant "common points" of law); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS 390 (1953) (noting that general principles encompass "the fundamental principles of every legal system" and that they "belong to no particular system of law but are common to them all").

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RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 102, Reporters' Note 1 (stating that Article 38(1) is "commonly treated as an authoritative statement of the 'sources' of international law"). The sources of international law are set forth in Article 38(1) of the Statute, which provides in relevant part: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... (c) the general principles of law recognized by civilized nations." Similarly, other major international treaties, such as the Rome Statute of the International Criminal Court, recognize general principles as a source of international law. Rome Statute of the International Criminal Court art. 21(1)(c), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998). In their decisions, international institutions routinely establish the content of international law through this exercise in comparative law, as a review of the jurisprudence of the ICJ[6] and specialized international tribunals[7]

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[6] *See, e.g.*, Case Concerning the Factory at Chorzow (Claim for Indemnity) (Merits), Judgment, 1928 A/17 at 29 (Sept. 13) ("[I]t is a general conception of law that every violation of an engagement involves an obligation to make reparation."); Corfu Channel Case (Merits), Judgment, 1949 I.C.J. 4, 84 (Apr. 9) (relying on general principles of law after concluding that no treaty applied to the conduct at issue).

[7] *See, e.g.*, Prosecutor v. Šainović, Case NO. IT-05-87-A, Appeals Judgment, ¶ 1643 (Int'l Crim. Trib. for the Former Yugoslavia

demonstrates.

2. The law of the United States, and especially the decisions of this Court, are fully receptive to general principles of law as a source of international norms. The Restatement provides that "[a] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from *general principles common to the major legal systems of the world.*" RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 102(1)(c) (AM. LAW INST. 1987) (emphasis added). This Court has repeatedly turned to general principles to determine the content of international law. *See United States v. Smith*, 18 U.S. 153, 160-161 (1820);

Jan. 23, 2014) (looking to national laws to define elements of liability pursuant to "doctrine of general principles of law recognised by nations"), Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 439-460 (Int'l Crim. Trib. for the former Yugoslavia Feb. 22, 2001) (looking to "to the general principles of law common to the major national legal systems of the world" to define elements of rape); Gonzalez. v. United States, Case 1490-05, Inter-Am. Comm'n H.R., Report No. 52/07, OEA/Ser.L/V/II.130, doc. 22, rev. 1 ¶ 42 (2007) (relying on "generally recognized principles of international law" to hold that remedies for domestic violence "must be both adequate . . . [and] effective."). *See also* Case 11/70, Internationale Handelsgesellschaft, 1970 E.C.R. 1125, ¶ 2 (finding "respect for fundamental rights forms an integral part of the general principles of law" and that the protection of those rights in international law is "inspired by the constitutional traditions common to the Member States").

Pearcy v. Stranahan, 205 U.S. 257, 270 (1907); *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623, 633 (1983).[8] This use of general principles would have been entirely familiar to the founding generation and the drafters of the ATS, *see, e.g.*, *Smith*, 18 U.S. at 160-161, and contemporary litigation under the ATS routinely turns to general principles as a source of *Sosa*-qualified norms. *See e.g.*, *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011) (finding corporate liability under the ATS because "corporate tort liability is common around the world"); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) (establishing corporate liability in principle under the ATS and admonishing the majority in *Kiobel I* for overlooking general principles); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (*en banc*) (consulting general principles to determine the contours of the requirement to exhaust domestic remedies); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (same, in the context of the Torture Victim Protection Act).

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[8] *Cf. Graham v. Florida*, 560 U.S. 48, 79-82 (2010) (continuing "longstanding practice in noting the global consensus" and noting United States was only nation to impose life without parole sentences on juvenile nonhomicide offenders); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (finding reference to the laws of other countries "instructive" for interpretation of Eighth Amendment).

3. By limiting its examination of international law to only customary international law, *Kiobel I* misunderstood the use of general principles. First, it erroneously stated that Article 38(1)(c) of the Statute of the ICJ "identifi[es] 'general principles of law recognized by civilized nations' as a source of *customary* international law." 621 F.3d at 141 n. 43 (emphasis added). To the contrary, Article 38(1) sets out the four sources of "*international* law," of which customary international law (or "international custom, as evidence of a general practice accepted as law") is but one and general principles is another. Statute of the ICJ, art. 38(1)(b); *see also* RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 102(1) (listing the sources of international law).

Second, the Court erroneously treated general principles as depending on proof of *opinio juris*, the conviction that a state's conformity to some general practice of States is a matter of legal obligation. Indeed, while acknowledging that corporate liability has been accepted by foreign legal systems, the court dismissed this evidence because, "although interesting as a matter of *comparative law*," it "does not demonstrate that corporate liability has attained the status of *customary international law*," because it was not universally accepted as obligatory to the extent required for *opinio juris*. 621 F.3d 141 n.43. That statement misses the point.

General principles are a distinct source of international law, proved not through the universal practice of states *inter se* combined with *opinio juris*, as customary international law is, but by seeking the common denominator among domestic legal systems. *See* Statute of the ICJ, art. 38(1)(c).

Third, under Article 38(1)(c) of the ICJ Statute, general principles are not a "secondary" source of international law, as the *Kiobel I* majority asserted. 621 F.3d at 141 n. 43. To the contrary, that Article provides that treaties in subparagraph (a), custom in subparagraph (b), and general principles in subparagraph (c) are equally valid sources of international law. Only the sources outlined in subparagraph (d), including "judicial decisions and the writings of the most highly qualified publicists of the various nations," are designated "secondary."[9]

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[9] *Kiobel I* cited a comment to the Restatement for the proposition that "[g]eneral principles are a *secondary source* of international law." 621 F.3d 141 n.43 (emphasis by the court). However, when read in context, the comment offers no authority for downplaying—let alone ignoring—the principles of corporate personhood and civil liability in legal systems around the world. The *Kiobel I* majority excluded the rest of the comment, which provides that "[g]eneral principles common to systems of national law may be resorted to as *an independent source of law*." RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 102, cmt. *l* (emphasis added). Thus, the term "secondary" in this context means "supplementary," not "subsidiary" or "insubstantial." This is clear from the text to which the comment attaches, which provides that "General

Therefore, the Second Circuit erred by not considering general principles as a source of international law, which led it to overlook the ways that corporate accountability can be, and is, established under international law.

II. Corporate Liability is a General Principle of Law Recognized by Legal Systems around the World.

Corporate liability for torts is a general principle recognized by legal systems around the world, and the *Kiobel I* majority erred by failing to take that principle into account when deciding whether corporate liability is available under the ATS.

A. To begin with, all legal systems recognize the liability of corporations for harm committed to others. *See Exxon*, 654 F.3d at 53 ("Legal systems

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principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate." Id. at §102(4). Under the Statute of the International Court of Justice, which the Restatement deliberately tracks, *id.* at Reporters Note 1, the only sources of international law deemed "subsidiary" are "judicial decisions and the teachings of the most highly qualified publicists of the various nations." The Restatement does not treat these latter authorities as sources of law at all, unlike general principles, and, even deemed "subsidiary," they are still entitled to "substantial weight" as evidence of international law. Id. at §103(b) and (c).

throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood"). Recent comparative law scholarship has found that every jurisdiction recognizes corporate liability in some form. *See* INTERNATIONAL COMMISSION OF JURISTS, *Civil Remedies, in* 3 REPORT OF LEGAL EXPERT PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 10 (2008) ("In every jurisdiction, despite differences in terminology and approach, [a corporate actor] can be held liable under the law of civil remedies if through negligent or intentional conduct it causes harm to someone else."); *see also id.* at 1 ("Across all jurisdictions, civil liability can arise for both companies as legal entities and for company officials, as natural persons.").

Moreover, comparative law studies demonstrate that major legal systems share the general principle of corporate liability for conduct that transgresses fundamental norms.[10] For

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[10] *See, e.g.*, INTERNATIONAL COMMISSION OF JURISTS, REPORT OF LEGAL EXPERT PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES, Vols. 1-3 (2008); INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES: A GUIDE FOR VICTIMS AND NGOS ON RECOURSE MECHANISMS (2010), *available at* http://www.refworld.org/docid/4c3d5ff62.html; RAMASASTRY*A Survey of Sixteen Countries* (seeking to achieve some geographic diversity and represent different legal systems, examining corporate liability in Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, Norway,

example, the International Commission of Jurists found that "in every jurisdiction, victims of gross human rights abuses or their families can initiate civil claims themselves." INTERNATIONAL COMMISSION OF JURISTS, *Civil Remedies*, at 4. Likewise, a 2006 study of sixteen geographically representative countries found that fifteen responded that it would be possible to bring civil legal claims against businesses associated with international humanitarian law or international criminal law breaches. *See* ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL

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the Netherlands, Spain, South Africa, Ukraine, the United Kingdom, and the United States). *See also* EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS (ECCHR), BUSINESS AND HUMAN RIGHTS: EUROPEAN CASES DATABASE, *available at* https://www.ecchr.eu/en/our_work/business-and-human-rights/publications.html; INTERNATIONAL COMMISSION OF JURISTS, BUSINESS AND HUMAN RIGHTS - ACCESS TO JUSTICE: COUNTRY REPORTS, *available at* https://business-humanrights.org/en/documents/international-commission-of-jurists-access-to-justice-country-reports (containing detailed discussion of corporate accountability in Brazil, China, Colombia, Ecuador, India, The Netherlands, Poland, South Africa, and the Philippines). *See also* ALLENS ARTHUR ROBINSON, 'CORPORATE CULTURE' AS A BASIS FOR THE CRIMINAL LIABILITY OF CORPORATIONS (Feb. 2008), available at https://business-humanrights.org/sites/default/files/reports-and-materials/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf

LAW: A SURVEY OF SIXTEEN COUNTRIES at 22 (FAFO ed., 2006), *available at* https://www.biicl.org/files/4364_536.pdf.[11]

This Court has recognized that a similar proposition, the liability of corporations as an incident of personhood, is a general principle shared by foreign courts and the United States, stating that "[i]n discussing the legal status of *private* corporations" under international law, "courts in the United States and abroad have recognized that an incorporated entity . . . is not to be regarded as legally separate from its owners in all circumstances." *First Nat'l City Bank (FNCB)*, 462 U.S. at 628-29. Among multiple authorities supporting this Court's conclusion in *FNCB* was the seminal decision of the International Court of Justice in *Case Concerning Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 39 (Feb. 5), which found a "wealth of practice already accumulated on the subject" of corporate personhood under domestic law around the world.

B. Under U.S. law, the principle that corporations are "deemed persons" for "civil purposes," and can be held civilly liable, has long been recognized as "unquestionable." *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); *see*

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[11] Only Indonesia reported no procedures for civil recovery in its code at that time. *Id.* at 22.

Beaston v. Farmers' Bank of Del., 37 U.S. (12 Pet.) 102, 134 (1838). Additionally, every circuit court of appeals to have addressed the question of corporate liability under the ATS has rejected the Second Circuit's conclusion and held corporations are subject to suit for violations of international law norms.[12]

C. As in the United States, civil liability against corporations, including for conduct constituting violations of international norms, is imposed in jurisdictions around the world. The below examples are representative of both the civil law and common law traditions.

1. In the European Union generally, Council Regulation (EC) No 44/2001 ("Brussels I Regulation") provides that the courts of member states have jurisdiction over civil proceedings against corporations based in the EU, including for conduct that violates international human rights norms, even if the damage occurred outside the EU and the victim is not domiciled in the EU. Pursuant to the Brussels I Regulation, "a company or other legal person or association of natural or legal

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[12] *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014), *cert denied*, 136 S. Ct. 798 (2016); *Exxon Mobil Corp.*, 654 F.3d at 57; *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1019-21 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business." Brussels I Regulation art. 60 ¶ 1(a)-(c). Moreover, a corporation can be sued in EU member countries where it has branches or subsidiaries for conduct arising out of the operations of those branches or subsidiaries. *See, e.g.* Motto v. Trafigura Ltd. [2011] EWCA (Civ) 1150 (Eng.) (Plaintiffs from Cote d'Ivoire sued Dutch corporation with English branch in English courts for damages from toxic waste dumping in and around Abidjan, Côte d'Ivoire). Thus a corporation can be liable in several different EU countries for its conduct.

2. In England, civil actions against corporations are available in tort, and domestic tort law has been regularly used as a vehicle to hold corporations responsible for human rights violations committed abroad. Indeed, English courts allow claims against a parent corporation domiciled in England for the human rights violations of its subsidiary abroad. For example, in Guerrero v. Monterrico Metals [2009] EWHC (QB) 2475 (Eng.), Peruvian claimants brought a claim against the parent company of a Peruvian mine in England alleging that the mine aided in the commission of torture by the Peruvian police. *See also* Lubbe v. Cape Plc, [1998] EWCA (Civ) 1351 (South African miners sued a company domiciled in England for injuries arising out of its

South African subsidiaries' mining operations in South Africa).

3. In France, courts allow civil actions against corporations for violations of applicable international norms. For example, a French court held that it had jurisdiction over a civil action against two French companies for actions allegedly taken in violation of international humanitarian law and international human rights law. Although the court ultimately dismissed the action, it indicated that the suit would have been able to proceed had the plaintiffs proved that the companies violated customary international law. *See* Cour d'appel [CA] [regional court of appeals] Versailles, Mar. 22, 2013, 11/05331 (Fr.). Likewise, the French Parliament has specifically contemplated civil liability for corporate violations of international human rights law. Recently, on February 21, 2017, the French parliament passed a "duty of vigilance" law, which requires corporations to publish annual "public vigilance plans" describing the steps that they will take to prevent "severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks" resulting from the corporation's presence abroad.[13] If a

[13] *See* Loi 2017-750 du 23 mars 2017 de relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-750 of Mar. 23, 2017 on the duty of oversight of parent companies and commissioning enterprises],

company does not publish a plan, victims of human rights violations can sue for damages "for the harm that due diligence would have permitted it to avoid."[14]

4. In the Netherlands, every provision of a treaty that the Netherlands has ratified and that has gone into force and that is written for the interest of a private person or corporation has direct effect as domestic law, with no implementation needed. As a part of domestic law, these treaty provisions are enforceable under Article 6:162 of the Dutch Civil Code, which applies to both corporations and individuals. That provision of the code provides for civil tort claims for damages whenever a corporation commits an unlawful act for which it is accountable and that causes injury.

5. Similarly, in Canada, the common law can be used to assert tort claims against multinational corporations for violations of customary

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Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Mar. 23, 2017 (Fr.). English translation available from, http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf

[14] Other countries have passed or are in the process of passing similar laws dealing specifically with human trafficking. *See* Modern Slavery Act 2015, c. 30, § 54 (Eng.); and Wet Zorgplicht Kinderarbeid, passed in the Lower House of the Dutch Parliament on February 7, 2017.

international law because the Supreme Court of Canada has ruled that customary international law is a part of Canadian domestic law. *See* R. v. Hape, [2007] 2 SCR 292, para. 39 (Can.) ("the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada"); *see also* Araya v. Nevsun Res. Ltd., [2016] D.L.R. 4th 383 (Can. B.C.) (allowing a civil lawsuit to proceed against a Canadian mining company for human rights abuses in Eritrea). In Quebec, which has a civil law system distinct from the common law system in the rest of Canada, the Superior Court has found that allegations of war crimes in violation of the Geneva Conventions are cognizable as a civil fault (i.e. tort) under the Quebec Civil Code if committed by a corporation. *See* Bil'in (Vill. Council) v. Green Park Int'l Ltd., [2009] QCCS 4151, para. 190 (Can.) ("if the Plaintiffs' allegations are true, a trial judge could find that the Corporations are at fault").

D. There is also growing acceptance throughout major legal systems of holding corporations liable under domestic criminal law for violations of international norms.[15] A 2006 study found that nine

[15] *See, e.g.* CODE PÉNAL [C. PÉN.] PENAL CODE art. 121-2 (Fr.);

of the countries surveyed—Argentina, Australia, Belgium, Canada, Germany, the Netherlands, South Africa, Spain, and the United Kingdom—provided for corporate criminal liability for the international law crimes of genocide, crimes against humanity and war crimes. *See* RAMASASTRY & THOMPSON at 15-16. As noted by the Special Representative of the U.N. Secretary-General, "[t]he number of domestic jurisdictions in which charges for international

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Art. 5 SR (Neth.); Criminal Code, R.S.C. 1985, c. C-46, § 2 (Can.); Code Pénal Suisse [CP] [Criminal Code] Dec. 21, 1937, SR 757 (1938) art. 102; Verbandsverant-wortlichkeitsgesetz [VbVG] [Law on the Responsibility of Associations] Bundesgesetzblatt I [BGBl I] No. 151/2005 §§ 1- 2 (Austria); Code Pénal [C.Pén] art. 5 (Belg.); The Indian Penal Code Act, No. 45 of 1860, PEN. CODE §§ 2, 11 (India); Penal Code. ch. 3a, § 48a (Nor.); Penal Code, Act No. 19 of 1940, ch. 2(a), art. 19 (b-c) (Ice.); Criminal Procedure Act 51 of 1977 §332 (S. Afr.); Crimes Act 1961, §2.1 (N.Z.); Criminal Code Act 1995 (Cth) s 12.1 (Austl.); Penal Code, ch. 2, art. 11 (Myan.); Revised Penal Code, § 9 (Fin.); Borgerlig straffelov [Danish criminal code], § 306; China Criminal Code Art. 30 (corporate liability for "unit crimes"); Revised Penal Code, Act No. 3815, (Phil.) (corporate liability if specified by individual penal statute); Criminal Code of the Republic of Lithuania art. 20 (Lith.); Criminal Code of the Republic of Moldova, art. 21(3) (Mold.); Law on the Criminal Liability of Legal Entities (9754/2007) (Alb.); Criminal Code, art. 45(1) (Rom.); Penal Code, ch. 224, s. 11 (Sing.); Código Penal (Criminal Code) art. 31 (Sp.). In Japan, two thirds of laws which provide punishment apply against corporations. *See* RAMASASTRY, *A Survey of Sixteen Countries* at 6-7.

crimes can be brought against corporations is increasing." U.N. Special Representative of the Secretary-General, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Special Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie,* ¶¶ 73-74, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (footnote deleted). That is important here both because it is evidence of a broader intent to hold corporations liable for such violations and because certain civil law countries do not draw a clear distinction between criminal and civil proceedings, and instead allow for victims of a violation to seek damages from a defendant in a criminal case, a practice highlighted by Justice Breyer's concurrence in *Sosa v. Alvarez-Machain*. 542 U.S. 692, 762-63 (2004). *See also* Robert C. Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 886 (2009) (noting that Argentina, Belgium, France, Japan, the Netherlands and Spain employ the mixed civil/criminal mechanism of *action civile* that allows a crime victim or his representative to seek tort damages against a defendant in a criminal case); RAMASASTRY & THOMPSON at 23 (discussing civil participation in criminal suits in Belgium, France, and Ukraine). Thus, victims of international law violations have

additional recourse through criminal proceedings in some civil law countries.

In France, for example, a private party may file a complaint against a corporation for damages, which initiates a criminal inquiry. *See id.* Foreign plaintiffs have used that procedure to bring suits against French corporations for violations of international human rights law, such as a case brought by eight Burmese villagers against the French corporation Total for human rights violations committed by the military junta in Myanmar. *Id.* at 32. Similarly, in the Netherlands, individuals who have suffered damages as a direct result of crimes committed by a third party can join in the criminal proceedings with a civil claim for damages. This procedure can be used against a corporation, and, as relevant here, Dutch law provides for corporate criminal liability for terrorism financing. *See* Art. 421 SR (Neth.).

Even those countries that do not provide for criminal liability over legal persons in the same manner as natural persons allow for criminal liability in certain areas, including anti-terrorism law. *See* Thompson et al., *Translating Unocal*, 40 GEO. WASH. INT'L L. REV. at 872 (discussing Argentina and Indonesia). And while some countries do not allow for criminal liability of legal persons, these countries, including Germany, Greece, Mexico, and Sweden, have adopted national

laws to impose fines or other equivalent sanctions on corporations for certain violations, including terrorism financing, a punishment that mirrors that imposed by countries that allow for criminal liability. For example, Germany allows for regulatory fines in an amount up to 10 million euros for "intentional criminal offenses" and 5 million euros for "negligent criminal offences" by a corporation. Ordnungswidrigkeitengesetz [OWiG] [Act on Regulatory Offences], Feb. 19, 1987, BGBL I at 602, § 30, para. 1 (Ger.).[16]

As the above illustrations demonstrate, corporations are subject to civil liability in all of the world's major legal systems for conduct that violates national and international norms and there is

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[16] Additionally, the general principle of corporate legal liability is reflected in the various international treaties that explicitly state that legal persons can and—in some cases must—be held liable for violations of the law of nations. *See, e.g.*, Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, art. 10(1), C.E.T.S. No. 196 (2005), https://rm.coe.int/168008371c; U.N. Convention Against Transnational Organized Crime, art. 10 ¶ 1, Nov. 15, 2000, 2225 U.N.T.S. 209; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, S. Treaty Doc. No. 105–43; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 2 ¶ 14, Mar. 22, 1989, 1673 U.N.T.S. 57, 28 I.L.M. 657 (1992); International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I ¶ 2, Nov. 3, 1973, 1015 U.N.T.S. 243.

growing acceptance of even criminal corporate liability. *Kiobel I* and the court below should have considered this general principle of corporate liability when determining the content of international law.

CONCLUSION

The decision of the court below should be reversed.

Respectfully Submitted,

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Dated: June 27, 2017

APPENDIX

APPENDIX A - LIST OF *AMICI CURIAE*

N.B. Institutional affiliations are for identification purposes only.

William J. Aceves is the Dean Steven R. Smith Professor of Law at California Western School of Law. He served as the Vice Dean for Academic Affairs from 2007-2014. He teaches International Law, Human Rights Law, Civil Procedure, and Constitutional Law. Professor Aceves is the author of THE ANATOMY OF TORTURE and the coauthor of THE LAW OF CONSULAR ACCESS. He co-edited LESSONS AND LEGACIES OF THE WAR ON TERROR. He is also the principal author of the Amnesty International USA Safe Haven report and has published numerous articles on human rights and international law. Professor Aceves has also represented several human rights and civil liberties organizations as amicus curiae counsel in cases before federal courts, including the U.S. Supreme Court. He currently serves on the boards for the Center for Justice & Accountability and the American Civil Liberties Union. He is a member of the Executive Committee of the American Branch of the International Law Association. He also serves as the Ombudsperson for Amnesty International USA. Professor Aceves has appeared before the Inter-American Commission on Human Rights, the U.N.

Special Rapporteur on Migrants, and the U.S. Commission on Civil Rights.

Maître Héloïse Bajer is a Practitioner in France with experience in international law.

Paul Beckett is Senior Counsel at MannBenham Advocates Limited in Isle of Man. He was the Honorary Representative of the Isle of Man Government in Switzerland while serving as the Senior Vice President of Deutsche Bank in Geneva. Mr. Beckett also served as Chairman of the Financial Services Tribunal, the Collective Investment Schemes Tribunal, and the Data Protection Tribunal. He is also a Fellow of the Royal Society for the encouragement of Arts, Manufactures and Commerce and a member of New College, Oxford University, where he completed a Master of Studies in International Human Rights Law in 2014.

John Beer is founding partner of Beer advocaten N.V., the largest and leading plaintiff law firm in the Netherlands. He has handled cases that led to landmark decisions of the Dutch Supreme Court. He has also been involved in group actions such as the dumping of toxic waste by Dutch oil trader in Cote D'Ivoire in 2006 and the shooting down of Malaysia Airlines Flight MH17 in 2014. He is the current President of the Pan European Organization of

Personal Injury Lawyers (PEOPIL), former Founding President (1997-2009) and now Honorary Member of the Dutch Association of Plaintiff Lawyers (ASP) and Member of the Board of Governors of the American Association for Justice (AAJ). In June of 2017 Mr. Beer received the Royal Honor of being appointed an Officer in the Order of Orange-Nassau.

Lord (Alex) Carlile of Berriew was appointed in July 2015 as a Member of the Independent Commission on Freedom of Information. He was the Liberal/Liberal Democrat MP for Montgomeryshire from 1983 to 1997. He served as spokesperson on a range of issues, including home affairs and the law, and was Leader of the Welsh Liberal Democrats from 1992 to 1997. Lord Carlile was a founding member of the All-Party War Crimes Group. He chaired the Select Committee of both Houses of Parliament on mental health legislation. He was appointed a Life Peer in 1999 and was awarded the CBE in 2012 for services to national security. From 2001 to 2011, he was the Independent Reviewer of Terrorism Legislation and the Independent Reviewer of the government's REVENT policy. From 2004 to 2012, he was a Chairman of the Competition Appeal Tribunal. He was also the Independent reviewer of National Security policy in Northern Ireland.

Lord Carlile is the Chairman of the Lloyd's of London Enforcement Board. Until recently he was vice chairman of the listed company Wynnstay Group plc. He is also the President of The Security Institute, a Fellow of King's College London, and a Fellow of the Industry and Parliament Trust. Lord Carlile is a member of the boards of numerous charities including the Royal Medical Foundation of Epsom College and The White Ensign Association. He was a co-founder of the Welsh charity Rekindle. He is chairman of the not-for-profit company Design for Homes and is a founding director of SC Strategy Ltd, a strategy and political risks consultancy.

Antoinette Collignon is partner at Legaltree and specialist in cross-border liability and private international law. She advises insurers, international claims agencies and companies as well as victims. In international cases, she works closely with law firms in Europe and the United States. She is co-founder of Pan European Organisation for Personal Injury Lawyers (PEOPIL) and served as its president from 2009 to September 2013. Ms. Collignon regularly lectures at conferences and seminars of the Pan European Organisation for Personal Injury Lawyers (PEOPIL) and other international organizations. She is a lecturer at StaatsDrukkerij en Uitgeverij (SDU) and was a part-time lecturer at the University of Leiden until May 2017. She has published various articles on

cross border personal injury law and published the chapter on private international law in the Dutch Personal Injury Handbook.

John Anthony Shivaji Felix, PhD is an Attorney-at-Law of the Supreme Court of Sri Lanka. He is a member of the Society of Legal Scholars of the United Kingdom and Ireland, as well as a member of the International Bar Association, where he serves on the committees for Taxes, Public Law, and Human Rights. Dr. Felix has been a panelist and presented research on international law at numerous conferences and symposiums, including at the 2017 National Law Conference organized by the Bar Association of Sri Lanka and the University Annual Research Symposium of the Department of Public and International Law. Dr. Felix is also a Member of the Drafting Committee on Economic, Social and Cultural Rights of the Sri Lanka National Human Rights Action Plan (NHRAP) 2017-2021, appointed by the Ministry of Foreign Affairs.

The Right Honorable Sir Edward Garnier is a practicing barrister specializing in media and information law, international human rights and corporate criminal law. He was the Solicitor General for England and Wales from 2010 to 2012 and a Conservative Member of Parliament from 1992 to 2017. Sir Edward took Silk as Queen's

Counsel in 1995 and was a Crown Court Recorder (part-time Circuit Judge) 1998-2015. In Parliament, he served on the home affairs select committee from 1992 until he was appointed as the Parliamentary Private Secretary (PPS) to the Ministers of State at the Foreign and Commonwealth Office 1994-96. In 1996 he became the Parliamentary Private Secretary to the Attorney General Sir Nicholas Lyell QC MP and in 1997 he additionally became the Parliamentary Private Secretary to the Chancellor of the Duchy of Lancaster, Roger Freeman MP. When his Party lost office in 1997, he joined the Opposition frontbench under William Hague as a spokesman on the Lord Chancellor's Department in 1997 and entered the Shadow Cabinet in 1999 as the Shadow Attorney General. He returned to the backbenches after the 2001 general election but became Opposition Spokesman for Home Affairs, and then for Justice, after the 2005 general election and then Shadow Attorney General again. In 2009 he was elected Chair of the newly formed All-Party Parliamentary Group on Privacy. In Government he introduced Deferred Prosecution Agreements into English law. In private practice, he has advised or acted for newspaper, book and internet defendant publishers, and for British and foreign politicians, film stars, businesspeople and others in the English Courts and the European Court of Human Rights. He acted for the Serious Fraud Office in the DPAs with Standard Bank (2015) and Rolls-Royce (2017).

He has written and broadcast extensively on legal issues.

Halabja Chemical Victims Society is an independent humanitarian league in the Kurdistan region of northern Iraq that supports the rights of families and victims of Halabja's chemical bombardment. The Halabja Chemical Victims Society works on behalf of people who have suffered from chemical weapons use, and plays an active role as an intermediary between international governments and non-governmental organizations.

Irit Kohn is the President of the International Association of Jewish Lawyers and Jurists. She previously served as the Director of the International Affairs Department for the Israeli Ministry of Justice for twenty years, where she was responsible for all international criminal law litigation conducted on behalf of the State of Israel. She was also a Lecturer on Extradition and Universal Jurisdiction at Bar-Ilan University and College of Management.

Sven Leistikow is a Practitioner in Germany with experience in transnational tort cases.

Anura B. Meddegoda is President's Counsel at King's College, London, as well as Attorney-at-Law of the Supreme Court of Sri Lanka and Partner and

Counsel in 1995 and was a Crown Court Recorder (part-time Circuit Judge) 1998-2015. In Parliament, he served on the home affairs select committee from 1992 until he was appointed as the Parliamentary Private Secretary (PPS) to the Ministers of State at the Foreign and Commonwealth Office 1994-96. In 1996 he became the Parliamentary Private Secretary to the Attorney General Sir Nicholas Lyell QC MP and in 1997 he additionally became the Parliamentary Private Secretary to the Chancellor of the Duchy of Lancaster, Roger Freeman MP. When his Party lost office in 1997, he joined the Opposition frontbench under William Hague as a spokesman on the Lord Chancellor's Department in 1997 and entered the Shadow Cabinet in 1999 as the Shadow Attorney General. He returned to the backbenches after the 2001 general election but became Opposition Spokesman for Home Affairs, and then for Justice, after the 2005 general election and then Shadow Attorney General again. In 2009 he was elected Chair of the newly formed All-Party Parliamentary Group on Privacy. In Government he introduced Deferred Prosecution Agreements into English law. In private practice, he has advised or acted for newspaper, book and internet defendant publishers, and for British and foreign politicians, film stars, businesspeople and others in the English Courts and the European Court of Human Rights. He acted for the Serious Fraud Office in the DPAs with Standard Bank (2015) and Rolls-Royce (2017).

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Anura B. Meddegoda is President's Counsel at King's College, London, as well as Attorney-at-Law of the Supreme Court of Sri Lanka and Partner and

Head of the Litigation Division of the law firm Varners. Mr. Meddegoda has been specializing *inter alia* in international law and published widely on the subject. He has presented several papers and shared his expertise at international fora including at the 4th Biennial Conference of the Asian Society of International Law held in New Delhi, India; ICRC 5th South Asian Conference on Sexual Violence and Armed Conflict in Kathmandu, Nepal, and was the keynote speaker at ICRC 13th International Humanitarian Law Moot Competition, Hong Kong. Mr. Meddegoda has previously served in the Office of the Prosecutor of the United Nations International Criminal Tribunal at The Hague, The Netherlands where he functioned as a Prosecuting Trial Attorney/Legal Adviser.

Bonita Meyersfeld is the director of the Centre for Applied Legal Studies and an associate professor of law at the School of Law, University of Witwatersrand, Johannesburg (NRF Y1 rating). She is an editor of the South African Journal on Human Rights and the founding member and chair of the board of Lawyers against Abuse. She teaches international law, business and human rights and international criminal law. Prior to working in South Africa, Ms. Meyersfeld worked as a legal advisor in the House of Lords in the United Kingdom and the gender consultant to the International Centre for Transitional Justice in New

York. Bonita obtained her LLB from Wits Law School and her LLM and JSD from Yale Law School. She is the author of Domestic Violence and International Law, Hart Publishing (UK) (2010).

Kaveh Moussavi is a Judge and Arbitrator at the International Court of Arbitration in Paris and former Head of the Public Interest Law Programme at the Centre for Socio-Legal Studies of Oxford University. Mr. Moussavi is also an Associate Research Fellow of Wolfson College at Oxford. Originally from Iran, where he was called to the Bar in 1978, he has served as an expert in numerous human rights cases, the most well-known of which is Kazemi v. Iran et al., before the Superior Court of Quebec in Montreal, Canada in 2009. He is active in the Oxford branch of Amnesty International.

Paul Mylvaganam, who graduated from Oxford University, is a Barrister-at-Law of 23 years practice at Goldsmith Chambers, in the Inner Temple in London. He specializes in international law and International criminal law and has a wealth of experience in cases of terrorism, corruption, and money laundering. Mr. Mylvaganam has appeared as Trial Counsel in high profile cases such as "The Oil for Food" case, prosecuted by the Serious Fraud Office, London, involving the Saddam Hussein regime and breaches of UK Sanctions laws. He has also appeared in Regina v B, the first

international corruption case prosecuted by the City of London Police, as well as the London Underground Bombing Case. In August 2014-2015, he was appointed as the Liaison Counsel for a Presidential Commission of Inquiry in Sri Lanka and more recently has been appointed by the United Nations to train lawyers in international human rights in Nigeria. Paul has also been involved in cases in the ICTY and the International Criminal Court in the Hague and regularly advises Governments on matters pertaining to International Law.

Damon Parker is a founding partner and head of litigation at Harcus Sinclair LLP in London, where he is Vice Chairman of the AMAR International Charitable Foundation, an award-winning charity that works in the Middle East. His international human rights work has included making representations to the Iraqi Special Tribunal over the alleged genocide of Marsh Arabs by Saddam Hussein's regime and to the Truth and Reconciliation Commission in South Africa.

Anita Ramasastry is the Roland Hjorth Professor of Law at the University of Washington School of Law. She also serves as the editor in chief of the Business and Human Rights Journal published by Cambridge University Press. In 2017, she was appointed by the United Nations Human Rights

Council as an independent expert and member of the U.N. Working Group on Business and Human Rights. Professor Ramasastry has authored numerous articles and repots focused on issue of corporate liability for involvement in human rights abuses. She co-authored a major study in 2006, *Commerce Crime and Conflict*, which examined the status of corporate liability in sixteen countries. Professor Ramasastry has also written about the treatment of business actors after World War II. From 1999-2000, Professor Ramasastry was a senior attorney and advisor to the Claims Resolution Tribunal for Dormant Accounts, which was established to resolve claims to Holocaust-era Swiss bank accounts. More recently, she worked on issues relating to business and human rights as a senior advisor in the International Trade Administration of the U.S. Department of Commerce from 2009-2011.

Chief Justice Rauf Abd al-Rahman was the replacement Chief Judge of the Supreme Iraqi Criminal Tribunal following the resignation of Chief Judge Rizgar Mohammed Amin. In his capacity as Chief Judge, he presided over the Al-Dujail trial of Saddam Hussein in 2006. Justice Rauf is an ethnic Kurd from Halabja, the site of the 1988 Halabja poison gas attack. After serving as Chief Justice on the High Tribunal (which was/is a hybrid court – incorporating both International Law and Iraqi Law), Justice Rauf served as the Minister of Justice

for the Kurdish Regional Government. He is now retired but continues to consult occasionally.

Sanjeevani Seneviratne is an Attorney-at-Law of the Supreme Court of Sri Lanka as well as a Research Analyst at the University of Colombo and a Legal Consultant for the Institute of Social Justice. Mr. Seneviratne also works as the Managing Editor for the Sri Lanka Journal of Bio Medical Informatics and as an editor for several other publications in Asia.

Maya Spetter is an Attorney who has represented plaintiffs in major international lawsuits, such as the 2014 crash of Malaysia Airlines flight MH17 and the 2015 crash of Germanwings flight 9525. Ms. Spetter is a member of the Organization of Specialized Liability Attorneys in the Netherlands and the Pan European Organization of Personal Injury Lawyers.

Ralph G. Steinhardt is a Professor of Law and Arthur Selwyn Miller Research Professor of Law at the George Washington University Law School. Professor Steinhardt specializes in international law, human rights, conflicts of laws, international civil litigation, and international business transactions. He is co-director of the Oxford-GW Program in International Human Rights Law at New College, Oxford. His current research and

advocacy concern the human rights obligations of multi-national corporations. He served as the only U.S. citizen on the Expert Legal Panel on that subject under the auspices of the International Commission of Jurists and has served as an expert witness in several federal cases testing the liability of corporations for aiding and abetting human rights violations by governments. Professor Steinhardt has written books and articles on the application of international law in U.S. courts, statutory construction, international trade law, jurisprudence, and human rights. He has served as legal counsel to several foreign governments in both commercial and intergovernmental matters and counsel to the U.N. High Commissioner for Refugees.

Evert Wytema is a Founding Partner at Van Wassenaer Wytema Personal Injury Lawyers and Mediators, a law firm that offers legal support to victims. Mr. Wytema is a member of Letselschade Advocaten (LSA), Advocaten voor Slachtoffers van Personenschade (ASP), the Dutch association of plaintiff lawyers, and the Pan European Organization of Personal Injury Lawyers (PEOPIL). Mr. Wytema has collaborated on several international lawsuits, including the lawsuit against Turkish Airlines after the crash at Schiphol Airport in 2009. Since 2013, Mr. Wytema has been secretary of De Stichting Fonds Toegang tot het Recht, a foundation for legal aid, and he is active in various

social organizations, including serving on the supervisory board of Public Housing and Social Welfare.

Liesbeth Zegveld specializes in liability for human rights violations, particularly cases brought on behalf of victims of war. She is the head of the international law & human rights department at Prakken D'Oliveira. She also set up the Nuhanovic Foundation, which is aimed at facilitating access to justice for war victims. In 2011 she received the Clara Meijer-Wichmann medal in recognition of her commitment to defending human rights, and in 2014 she received the Amsterdam Dean's Award. In 2016 she was voted 'Most Valued Lawyer' of the year.